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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1277

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and CRAIG MARSH,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC), with the consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondis-

[1] Their consents have been filed with the Clerk of the Court.

criminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter "Section 504" or "the Act"). In addition, most of EEAC's members are federal contractors subject to Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, which requires federal contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. Accordingly, EEAC's members have a direct interest in the issues presented in this case; *i.e.*, whether the disease of infectious, contagious tuberculosis constitutes a handicap within the meaning of Section 504 and whether a person with infectious tuberculosis can be "otherwise qualified" for the job of elementary school teacher within the meaning of Section 504.

Because of its interest in issues arising under Section 504 of the Rehabilitation Act, EEAC has filed amicus curiae briefs with this Court in a number of cases construing that statute. *See, e.g., Alexander v. Choate*, 105 S.Ct. 712 (1985); *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984); *Uni-*

versity of Texas v. Camenisch, 451 U.S. 390 (1981); and *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

This case involves a challenge under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to the dismissal from her job as an elementary school teacher of an individual who suffered from the disease of infectious tuberculosis.

Mrs. Gene Arline first contracted tuberculosis in 1957, after which the disease was in remission. In 1966, she was hired as an elementary school teacher in Nassau County, Florida. In 1977, she suffered a relapse of tuberculosis and in 1978 she suffered two additional relapses. After the first two relapses, she was suspended from her teaching duties and allowed to return to teaching after treatment. Following the third relapse, she was dismissed from her job.

After unsuccessfully contesting her dismissal in state administrative proceedings and in state court, Arline filed suit in federal court alleging that her dismissal violated Section 504 of the Rehabilitation Act. She contended in her suit that her susceptibility to tuberculosis made her a "handicapped individual" within the meaning of the Act and that her dismissal violated Section 504 because she was "otherwise qualified" for the job if given reasonable accommodation.

Following a non-jury trial, the district court, in an unreported opinion, found for the School Board. The court initially concluded that Arline was not a "handicapped individual" because Congress did not intend for infectious or contagious diseases to be covered within the definition of a "handicapped individual" (Petition for Writ of Certiorari, Appendix C at 2) (hereinafter "Pet. App."). The court further held that even if she were considered to be a "handicapped individual," she was not otherwise qualified for other non-elementary school positions because she was not certified to teach outside of elementary education (Pet. App. at C 2). Finally, the court concluded that the School Board had no obligation to offer her positions outside of elementary education because of its overrding duty to protect the public from persons with infectious or contagious diseases (Pet. App. at C 3).

The Eleventh Circuit, in an opinion reported at 772 F.2d 759, held that a person with tuberculosis "has a physical or mental impairment which substantially limits . . . major life activities," 29 U.S.C. § 706(7)(B) (1985), and thus falls within the meaning of a handicapped individual for purposes of Section 504 of the Rehabilitation Act. The court stated that neither the statute itself nor the regulations issued under it dictated that chronic contagious diseases should be excluded from the definition of "handicap." The court remanded the case to the lower court for a determination of whether Arline would be "otherwise qualified" if given "reasonable accommodation."

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the disease of infectious, contagious tuberculosis is a handicap within the meaning of the Rehabilitation Act of 1973. Neither the Rehabilitation Act itself, its legislative history, nor the regulations promulgated under the Act indicate that Congress intended an infectious, contagious disease such as tuberculosis to be a covered handicap.

The longstanding recognition by Congress and the Executive Branch of tuberculosis as a communicable disease of such seriousness that individuals afflicted with it may be subjected to apprehension, detention or isolation clearly demonstrates that Congress could not have intended such a disease to be protected as a handicap. *See, e.g.*, 42 U.S.C. § 264(b) (1982). In addition, it should be presumed that Congress was aware of the numerous enactments of state and local governments designed to combat the spread of communicable diseases such as tuberculosis. Given this prior treatment of tuberculosis by Congress and by state and local governments, there is no reason to believe that Congress intended to cover as a handicap an infectious, contagious disease that poses a direct threat to the health and safety of others.

The respondent in this case was not dismissed because she was physically or mentally impaired in any way that affected her ability to perform her job—rather, she was terminated out of concern that she would infect others with whom she might come in contact. Under these circumstances, it cannot be said that her disease "substantially limits" a "major life activity" within the meaning of Section 504.

Even if tuberculosis is deemed to be a handicap, the School Board acted lawfully in dismissing the respondent based on the fact that she was not "otherwise qualified" for the position of elementary school teacher because she could not perform the essential functions of the job without endangering the health and safety of others. The School Board in this case was entitled to treat the absence of tuberculosis as a qualification for employment—a qualification which the respondent did not possess.

The School Board met any obligation of "reasonable accommodation" of the respondent's disease by allowing her temporarily to be suspended from her teaching duties following her first two relapses of tuberculosis and by dismissing her only following a third relapse. The School Board was under no legal obligation to attempt to accommodate the respondent by offering her jobs other than the job which she held at the time of her dismissal.

ARGUMENT

I. THE DISEASE OF INFECTIOUS, CONTAGIOUS TUBERCULOSIS DOES NOT CONSTITUTE A HANDICAP WITHIN THE MEANING OF THE REHABILITATION ACT.

The lower court erred in holding that the disease of infectious, contagious tuberculosis constitutes a "handicap" within the meaning of the Rehabilitation Act of 1973, as amended (hereinafter "the Act"). The lower court decision cited no specific indications in the language of the statute, the regulations promulgated under the statute, or in the legislative history that Congress intended such diseases to be covered as a handicap under the Act. In fact, there are strong indicia in a number of other laws that clearly

demonstrate the unlikelihood that Congress intended for such diseases to be covered. Because the inclusion of such infectious, contagious diseases would expand the definition of a handicap beyond that which Congress intended, the decision of the lower court should be reversed and this Court should hold that tuberculosis is not a handicap within the meaning of the Rehabilitation Act.

A. Neither the Rehabilitation Act Itself, Its Legislative History, Nor the Regulations Promulgated Under The Act Indicate That Congress Intended An Infectious, Contagious Disease To Be A Covered Handicap Under Section 504.

Section 504 of the Rehabilitation Act provides that "no otherwise qualified handicapped individual" should be subjected to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. § 794 (1985).[2] Section 706(7)(B) of the Rehabilitation Act, 29 U.S.C. § 706(7)(B), defines a "handicapped individual" as any individual who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

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[2] Section 504 reads in relevant part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Thus, the language of the statute itself does not expressly include infectious, contagious diseases within the definition of a "handicapped individual." As noted below, court decisions construing the definition of handicap have excluded from coverage diseases which pose a threat to the health or safety of others, which are transitory, or which do not impair a "major life activity."

Regulations issued by the Department of Health and Human Services, 45 C.F.R. § 84.3(j)(2) (1983), provide in relevant part that:

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, seeing, hearing, speaking, breathing, learning, and working.

The regulations also make no mention of any specific diseases and thus offer no specific guidance as to whether tuberculosis is a covered "physical or mental impairment" within the meaning of the Act.

The HHS analysis accompanying the regulations states that the term "physical or mental impairment" includes "such diseases and conditions as orthopedic,

visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and . . . drug addiction and alcoholism." 45 C.F.R. Pt. 84, App. A at 297 (1983). It is significant that the analysis includes neither tuberculosis nor any other disease or condition that constitutes a direct threat to the health or safety of others.

In the absence of any clear indication from either the statute or the regulations that infectious, contagious diseases such as tuberculosis were intended to be covered, it was incumbent upon the plaintiff below and the court of appeals to adduce evidence from the legislative history of the Act that clearly indicates that Congress intended such diseases to be covered as a handicap. *See Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969). This the plaintiff below and the lower court simply failed to do.

In its recent decision in *Bowen v. American Hospital Assn.*, 54 U.S.L.W. 4579 (U.S. June 9, 1986), the Court emphasized the importance of looking to the legislative history under the Rehabilitation Act in determining whether Congress intended certain actions to be covered under the Act. The Court noted in that case that:

> The legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant. As the Court of Appeals noted, there is nothing in the legislative history that even remotely sug-

gests that Congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." 729 F.2d 144, 159 (1984). 54 U.S.L.W. at 4588 n.33.

Similarly, in the instant case the plaintiff and the lower court cited *no* evidence that Congress ever contemplated that infectious, contagious diseases such as tuberculosis would be included as a handicap under the Act.[3] While there was nothing from the legislative history cited by the lower court to support its conclusion that tuberculosis was a handicap, the legislative history specifically states that the definition of handicap was not intended to be "totally open ended." S. Rep. No. 1297, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6413.

In *Alexander v. Choate*, 105 S.Ct. 712, 720 (1985), this Court noted that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives *and the desire to keep § 504 within manageable bounds*." (Emphasis added). The lower court cited neither statutory language, legislative history, nor regulations that provide any direct evidence of Congressional intent to include infectious, contagious diseases such as tuberculosis within the definition of handicap under the Act.

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[3] The absence of any support in the legislative history for the inclusion of an infectious, contagious disease within the meaning of "handicap" is particularly significant where "the situation in question is dramatically different in kind, not just in degree, from the applications of section 504 discussed in the legislative history." *United States v. University Hosp., State University of New York*, 729 F.2d 144, 159-60 (2d Cir. 1984).

The court of appeals, in holding that tuberculosis was a covered handicap, reasoned that the disease constitutes a physical or mental impairment which substantially limits major life activities "since the disease can significantly impair respiratory functions as well as other major body systems." 772 F.2d at 764. The lower court stated that tuberculosis fits within what it believed to be the literal definitions contained in the statutes and the regulations, and noted that "we would be hard pressed to find an exemption without further legislative direction." *Id.* The court of appeals' decision that virtually any condition or disease that fits within the literal definition of handicap contained in the statute and regulations is covered by the Act would appear to be at serious odds with the admonition of Congress that the definition was not intended to be "totally open ended." Moreover, by holding that "there is no such legislative direction," *id.*, the lower court ignored a substantial body of laws passed by Congress and orders issued by the Executive Branch which clearly indicate that Congress could not have intended that an infectious, contagious disease such as tuberculosis would be considered to be a handicap under the Rehabilitation Act.

B. Clear Expressions By Congress And The Executive Branch Prior To The Enactment Of The Rehabilitation Act Demonstrate That Congress Could Not Have Intended Infectious, Contagious Diseases To Be Covered By The Act.

It is extremely unlikely that Congress intended the Rehabilitation Act to be interpreted in a vacuum that disregarded other legislation that deals directly with tuberculosis and other infectious diseases and that predated the Rehabilitation Act by several dec-

ades. For example, 42 U.S.C. § 264 authorizes the Secretary of Health and Human Services (HHS) to issue regulations to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or from one state to another. 42 U.S.C. § 264(a) (1982). Congress has authorized the Secretary to issue regulations that provide for the "apprehension, detention, or conditional release" of persons who have contracted certain "communicable diseases" specified in Executive Orders of the President issued upon the recommendation of the National Advisory Health Council and the Assistant Secretary for Health of HHS. 42 U.S.C. § 264(b) (1982).

A series of Presidential Executive Orders consistently has designated tuberculosis as such a communicable disease and those persons with tuberculosis may be subject to "apprehenion, detention, or conditional release" pursuant to HHS regulations.[4] *See* Exec. Order No. 9708, 11 Fed. Reg. 3241 (March 28, 1946); Exec. Order No. 10,532, 19 Fed. Reg. 3209 (June 2, 1954); Exec. Order No. 11,070, 27 Fed. Reg. 12,393 (December 14, 1962); Exec. Order No. 12,452, 48 Fed. Reg. 56,927 (December 22, 1983). Other statutes enacted prior to the Rehabilitation Act treat tuberculosis in a similar fashion. *See, e.g.*, 8

[4] HHS regulations, in accordance with the Executive Orders, designate "tuberculosis" as a communicable disease that may subject the afflicted person to apprehension, detention or conditional release. *See* 42 C.F.R. § 1240.54 (1985); *see also* 42 C.F.R. § 71.32 (1985) (providing for the detention, isolation, or surveillance of persons arriving in the United States whom the Director of the Center for Disease Control has reason to believe are infected with or have been exposed to tuberculosis).

U.S.C. § 1285 (1970) (making it unlawful for any vessel or aircraft carrying passengers entering the United States to have employed on board on arrival any alien afflicted with tuberculosis).

Thus, the longstanding recognition by Congress and the Executive branch of tuberculosis as a communicable disease that could subject afflicted individuals to apprehension, detention or isolation conclusively demonstrates that Congress could *not* have intended such a disease to be protected as a handicap under the Rehabilitation Act. In a similar context, the Second Circuit in *United States v. University Hosp., State University of New York*, 729 F.2d 144, relied heavily on Congressional enactments prior to the Rehabilitation Act in determining whether Congress intended medical treatment decisions to be covered by the Act. After noting that prior to the passage of the Rehabilitation Act, Congress had passed a number of measures limiting federal involvement in medical treatment decisions, the court concluded that:

> In view of this consistent congressional policy against the involvement of federal personnel in medical treatment decisions, we cannot presume that Congress intended to repeal its earlier announcements in the absence of clear evidence of congressional intent to do so (citation omitted). As has already been seen there is no such clear expression of congressional intent in either the language or legislative history of section 504. *Id.* at 160.

See also Bowen v. American Hospital Assn., 54 U.S.L.W. at 4584.

Similarly, where Congress and the Executive Branch consistently and historically have considered

tuberculosis to be so serious a communicable disease that they have provided for the apprehension, detention and isolation of persons afflicted with the disease, it defies logic to argue that Congress would have protected such persons under the Rehabilitation Act from being removed from contact with public school children, or from co-workers generally. The inclusion of such communicable diseases within the meaning of a "handicap" under Section 504 would dictate that virtually *any* disease, no matter how dangerous to others, would be similarly covered. It simply is inconceivable that Congress could have intended such a result.[5]

In addition to these clear expressions by Congress prior to the passage of the Act of the severe health

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[5] It is clear that, contrary to the lower court's decision, "section 504 was never intended by Congress to be applied blindly and without any consideration of the burdens and intrusions that might result." *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395, 402 (D.D.C. 1983). For example, a decision by this Court holding that an infectious, contagious disease such as tuberculosis is a handicap under the Rehabilitation Act also could subject employers to the possibility of damage suits based on the emerging theories of negligent hiring or negligent retention of employees. *See, e.g., Doe v. New York University*, 666 F.2d 761, 777 (2nd Cir. 1981); *Henley v. Prince George's County*, 503 A.2d 1333 (Md. 1986); *Abbott v. Payne*, 457 So.2d 1156 (Fla. App. 4 Dist. 1984); *Pruitt v. Pavelin*, 685 P.2d 1347 (Ariz. App. 1984). Under such emerging theories, it is not unlikely that an employer who was required to retain an employee with a contagious disease such as tuberculosis might be sued by employees who were exposed to the disease in the workplace. Given this possibility, it is unlikely that such diseases should receive protection under the Rehabilitation Act.

threat that tuberculosis presents, it should be presumed that Congress also was aware that state and local governments had enacted numerous health codes designed to contain the spread of communicable diseases such as tuberculosis. *See, e.g.*, Va. Code § 32.1-51 (1985); Fla. Stat. Ann. § 29-392.26 (providing for compulsory isolation, quarantine and treatment of persons with tuberculosis).

Moreover, state law in Florida requires the School Board to provide for the welfare of children attending public schools, including their health and safety. Fla. Stat. Ann. § 230.33(b) (Supp. 1980). Citing this obligation of the School Board under state law, a state court in Florida rejected Mrs. Arline's challenge to her dismissal. In doing so, the court noted that "[a] teacher with infectious tuberculosis is a totally unacceptable health risk to the highly susceptible children she teaches." *School Bd. of Nassau County v. Arline*, 408 So.2d 706, 708 (Fla. Dist. Ct. App. 1982).

The inclusion of infectious, contagious diseases such as tuberculosis within the definition of "handicap" under the Rehabilitation Act could undercut significantly the ability of state and local governments to protect the health and safety of their citizens. In the absence of some clear indication from Congress of an intent to allow such an interference with traditional state areas of regulation, this Court should be particularly reluctant to do so by decision. *See e.g., Bowen*, 54 U.S.L.W. at 4588-89, *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152 (1944).

C. The Decision Below Extending Section 504 To A Condition That Constitutes A Direct Threat To The Health Or Safety Of Others Is Not Supported By Other Court Decisions Or Agency Interpretations Of Section 504.

Prior to the instant court of appeals' decision, the courts had taken care to limit the definition of a handicapped individual to those conditions which fall easily within a common understanding of handicap. *See, e.g., Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) (hearing impairment); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Simon v. St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982) (paraplegia); *Coleman v. Darden*, 595 F.2d 533 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979) (blindness). The handicaps recognized in these cases have been ones in which physical or mental limitations did *not* pose an immediate and direct threat to the health and safety of co-workers and other persons having contact with the handicapped individual.[6] There is

[6] A number of decisions have implied or held that an illness that is "transitory" or not "stabilized" is not a handicap within the meaning of the Act. *See, e.g., Pushkin v. Regents of University of Colorado*, 658 F.2d at 1388 (a handicapped person is "stabilized" in that the defect is predictable and can be accounted for, whereas an ill person is not stabilized); *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) ("transitory" illnesses not a handicap); *Doss v. General Motors Corp.*, 25 FEP Cases 419, 421 (C.D. Ill. 1980) (chronic infection in ears an illness and not a handicap under Illinois statute). The distinction recognized in these cases between an "illness" and a "handicap" lends support to the conclusion that tuberculosis should *not* be considered to be a handicap

no reason to believe that Congress meant to equate such non-threatening physical or mental impairments with an infectious, contagious disease which poses a direct threat to the health and safety of elementary school children as well as other persons employed in the school system. In the absence of a clear indication that such diseases were intended to be viewed as handicaps, this Court should not depart from the common view of handicapping conditions.[7]

D. Even If Respondent's Tuberculosis Were An "Impairment" Within The Meaning Of Section 504, It Did Not "Substantially Limit" A "Major Life Activity."

Even if tuberculosis were to be considered an "impairment" within the meaning of Section 504, it is

under the Rehabilitation Act. *See also de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (being left-handed is a physical characteristic and not an "impairment" within the meaning of the Act).

[7] The Department of Justice, which has responsibility for coordinating the implementation and enforcement of Section 504 by executive agencies, *see* Exec. Order No. 12,250 § 1-201(c), 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 note, has concluded that "section 504 does not reach discrimination based on communicability." Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, signed by Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 39, *reprinted in* 122 Daily Labor Report at D-1 (June 25, 1986). In criticizing the lower court decision in this case, the memorandum correctly noted that Mrs. Arline "was discharged because of her ability to transmit the disease," *id.* at 27 n.70, and such "communicability is not a handicap under section 504." *Id.* The Department of Justice opinion also contains a detailed discussion of federal, state and local quarantine laws which render it unlikely that Congress would have included communicable diseases within the federal definition of a handicap.

doubtful that such a disease "substantially limits" a "major life activity" within the meaning of that Section. It is undisputed that Mrs. Arline was able, both physically and mentally, to perform the duties of elementary school teacher when she was dismissed.[8] Thus, the reason she was dismissed was not because she was physically or mentally impaired in any way that affected her ability to perform the job. Rather, the reason she was terminated was because of the concern that she would infect others with whom she might come in contact. Under these circumstances, it cannot be said that she was substantially limited in a major life activity within the meaning of Section 504 and its accompanying regulations. *See, e.g., Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985) (individual with "crossed eyes" not handicapped within the meaning of the Act); *School Dist. of Philadelphia v. Friedman*, 40 FEP Cases 896, 898 (Pa. Comm. Ct. 1986) (chronic lateness not a handicap under Pennsylvania statute because it did not limit a major life activity).

II. THE RESPONDENT WAS LAWFULLY DISCHARGED BECAUSE SHE WAS NOT OTHERWISE QUALIFIED WITHIN THE MEANING OF THE REHABILITATION ACT.

In the event the Court finds that tuberculosis is a covered handicap under the Act, the lower court decision should be reversed because Mrs. Arline was not

[8] Neither the arguments below nor the opinion of the court of appeals was based on the fact that the performance of her teaching job by Mrs. Arline in any way caused her to experience distress in breathing or that the "major life activity" of "breathing" was substantially impaired *as it related to the performance of the job in question. See* 45 C.F.R. § 84.3(j)(2)(ii).

"otherwise qualified" within the meaning of the Rehabilitation Act. The undisputed medical evidence in this case indicated that Mrs. Arline was not "otherwise qualified" for and properly was removed from her position as an elementary school teacher because of the threat that her condition presented to the health of the children with whom she would come in contact. The School Board made substantial attempts to accommodate her in her elementary school teaching position and was under no legal duty to accommodate Mrs. Arline's illness further by offering her other positions.

A. Because Of The Danger Which The Condition Presents To The Health And Safety Of Others, A Person With Tuberculosis Is Not Otherwise Qualified To Be An Elementary School Teacher.

Section 504 prohibits discrimination only against an "otherwise qualified handicapped individual." In *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), this Court defined an "otherwise qualified" person as "one who is able to meet all of a program's requirements in spite of his handicap." In *Davis*, this Court noted that a recipient of federal funding is *not* required to make "major adjustments" in its programs or "to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413. Of importance for this case, the Court also noted that the program in issue in *Davis* sought "to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast," *id.* at 413 n.12, and that "nothing in the Act requires an educational institution to lower its standards." *Id.*

In addition to *Davis*, numerous other cases have recognized that employers may and should take into

account the health and safety of others in determining whether a person is an "otherwise qualified handicapped individual" under the Act. For example, in *Prewitt v. United States Postal Service*, 662 F.2d 292, 310 (5th Cir. 1981), the Fifth Circuit held that:

> The ultimate test is whether, with or without reasonable accommodation, a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question *without endangering the health and safety of the individuals or others.*" 28 C.F.R. § 1613.702(f) (emphasis added).[9]

See also Gardner v. Morris, 752 F.2d 1271, 1284 (8th Cir. 1985); *Stutts v. Freeman*, 694 F.2d 666, 669 n.3 (11th Cir. 1983).

Similarly, in *Mantolete v. Bolger*, 767 F.2d at 1423, the Ninth Circuit has stated that a handicapped

[9] The EEOC regulations interpreting "qualified handicapped person" expressly state that a handicapped person is one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 28 C.F.R. § 1613.702(f) (1985). Neither the HHS regulations, 45 C.F.R. § 84.3(k) (1983), nor the Department of Justice regulations, 41 C.F.R. § 41.32 (1981), expressly include the health and safety factor contained in the EEOC regulations. But, as noted in footnote 7, the Department of Justice's recent opinion letter to HHS expressly interprets the statute as incorporating those safety concerns. Therefore, whether it is expressly noted, as in the EEOC regulations, or contained by implication, as in the HHS and DOJ regulations, it is clear that the health and safety factor necessarily must be included in any analysis of the requirements for coverage as an "otherwise qualified" or as a "qualified handicapped" individual under the Act.

individual must be "presently qualified to perform the essential requirements of the job *without a reasonable probability of substantial injury to the applicant or others.*" (emphasis added). Other courts also have focused on the safety factor in determining whether an individual is otherwise qualified under the Act. *See, e.g., Doe v. Region 13 Mental Health Mental Retardation Comm'n*, 704 F.2d 1402, 1412 (5th Cir. 1983) ("where there is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of Section 504 could reasonably be found"); *Doe v. New York University*, 666 F.2d at 777 ("any appreciable risk" could properly be taken into account); *McCleod v. City of Detroit*, 39 FEP Cases 225, 228 (E.D. Mich. 1985); *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. 731, 744 (D.R.I. 1984) ("an employer may consider his employee's disability as it may affect the safety and welfare of other employees"); *Swann v. Walters*, 620 F. Supp. 741, 747 (D.D.C. 1984).

This Court also has recognized the importance of safety concerns in evaluating claims under other statutes. *See, e.g., Western Air Lines v. Criswell*, 105 S.Ct. 2743, 2754 (1985) ("The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case"); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 581 n.20 (1979).

Congress itself has excluded from the definition of a "handicapped individual" those persons whose current use of alcohol or drugs would make their employment "a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B) (1985). In addi-

tion, it has been recognized that "[i]t would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others." *Doe v. New York University*, 666 F.2d at 777. There is no reason to think that Congress would have intended any different result where the threat to others was the possibility of contracting an infectious, contagious disease such as tuberculosis.

Numerous courts have recognized the deference under Section 504 which the decisions of the recipients of federal funding must be accorded. For example, in *Doe v. Region 13 Mental Health Mental Retardation Comm'n*, 704 F.2d at 1410, the Fifth Circuit correctly read this Court's decision in *Davis* as supporting "a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person." Similarly in *Doe v. New York University*, 666 F.2d at 776, the Second Circuit noted that "considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its applictaion of them serve no purpose other than to deny an education to handicapped persons." *See also Strathie v. Department of Transp.*, 716 F.2d at 231. Given the School Board's role in ensuring the health and safety of its students and employees and the express requirements in this regard contained in the Florida Statutes, see above, page 15, this deference is particularly appropriate in this case.[10]

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[10] In determining whether Mrs. Arline was "otherwise qualified" to continue teaching, this Court should look to whether there was a "substantial, reasonable basis" for the decision to dismiss her. *Doe v. Region 13*, 704 F.2d at 1410, 1412; *Coleman v. Darden*, 595 F.2d at 540 (employment decision was "rationally based"); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) ("substantial justification" test); *Bento v. I.T.O. Corp. of Rhode Island*, 599 F. Supp. at 744 ("If the employer reasonably believes that the employee is unable adequately to perform the work and refuses to hire him on that basis, the federal law will not have been transgressed").

The School Board's conclusions were supported amply by the record. Mrs. Arline was dismissed from her job as an elementary school teacher after her third relapse of tuberculosis within a two year period. The physician who testified in the district court as an expert recommended, prior to Mrs. Arline's dismissal, that she not continue to teach elementary school students (J.A. at 13, 15). The reason for her recommendation was that "small children are considered highly susceptible to tuberculosis and because the pattern of relapse suggested that there might be a possibility of further relapses" (J.A. at 13.)[11] She also testified that while small children were the most susceptible to tuberculosis, there is susceptibility in all persons, whether young or old (J.A. at 16, 37).

The physician acknowledged that prior to Mrs. Arline's dismissal, she was worried that Mrs. Arline might continue to have positive cultures for tuberculosis or relapses (J.A. at 30). She was not able to say at trial that Mrs. Arline would not have further relapses (J.A. at 31), and she testified that she was not aware of any person who had had multiple relapses of tuberculosis who was teaching in a public school (J.A. at 20). Finally, the physician acknowleged that because of a lag time in receiving tuber-

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[11] She testified that tuberculosis could be passed on to others by exhaling, respiration, coughing, sneezing or breathing (J.A. at 23).

culosis test results, a person with active tuberculosis might not be detected for a substantial period of time (J.A. at 24-25).

After assessing the danger which Mrs. Arline's condition posed to the health, safety and welfare of the school system, its students and employees, the School Board made the decision to terminate her employment (J.A. at 62-63; 81). Given the seriousness of her illness and the School Board's duty to protect the health of its students and employees, it simply cannot be said that this decision to make its concerns for health and safety a requirement for the job violated Section 504. Under these circumstances, the School Board was entitled to treat the absence of tuberculosis as a qualification for employment which Mrs. Arline was unable to meet.

B. The School Board Made Reasonable Attempts To Accommodate Respondent's Condition In The Job She Held And Was Not Required To Offer Her Other, Different Jobs.

As noted above, in *Davis*, 442 U.S. at 410, 412-413, this Court held that a recipient of federal funding is not required to make "extensive modifications" or to effect "major adjustments" to its programs to accommodate a handicapped person. In *Alexander v. Choate*, 105 S.Ct. at 721, the Court further explained that *Davis* dictated that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *See also id.* at n.20.[12] Regardless of the precise contours of the

[12] The HHS regulations provide that a "qualified handicapped person" is "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (1985).

"reasonable accommodation" obligations under Section 504, it is clear that the School Board did everything that it reasonably could have done to accommodate Mrs. Arline and that she still was not qualified to teach in an elementary school setting.

Following her first two relapses of tuberculosis in 1977 and 1978, Mrs. Arline was temporarily suspended from her teaching duties and was permitted to return to teaching after treatment of her condition (J.A. at 50, 81). Thus, it is clear that the School Board made substantial attempts to accommodate Mrs. Arline's condition by allowing her temporarily to be suspended from her teaching duties until she was treated successfully. It was only after a third relapse and the recommendation of a state specialist in tuberculosis that she not be allowed to teach elementary school students that she ultimately was dismissed. Under these circumstances, it is clear that the attempts of the School Board to make a "reasonable accommodation" to Mrs. Arline's illness satisfied the requirements of Section 504.

The HHS regulations on "reasonable accommodation" provide that:

> A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. 45 C.F.R. § 84.12(a).

Because of the significant health risks to others presented by Mrs. Arline's condition, it is clear that any accommodation which required the School Board to

retain her in its employ would have constituted an "undue hardship" within the meaning of the regulations.

The order of this Court granting the petition for a writ of certiorari requested briefing and argument on the question of "[w]hether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' *for the job of elementary school teacher* within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794?" (Emphasis added.) The respondent virtually concedes, as she must, that she was not "otherwise qualified" for the job of elementary school teacher. The respondent has argued, however, that she should have been afforded some other position where she would come in contact with less susceptible persons. Even if the issue of accommodating her by offering her some other job *outside the elementary school setting* is properly before the Court, it is clear that the School Board did not act unlawfully in failing to offer her such a position.

While the duty of "reasonable accommodation" may require a recipient of federal funding to make certain accommodations in the job held or applied for, there is *no* duty under Section 504 to accommodate by offering *other, different* jobs to the employee. Any such requirement under Section 504 would be contrary to this Court's admonition in *Davis* that a grantee is not required to make "fundamental" or "substantial" modifications to accommodate a handicap. Such an open-ended requirement to seek out and offer jobs which the handicapped person has not held or applied for could not have been contemplated by Congress or by this Court's decision in *Davis*.

Decisions of the lower courts have recognized that the duty to accommodate extends only to the position held or sought by the handicapped individual. For example, in *Carty v. Carlin*, 623 F. Supp. 1181 (D. Md. 1985), the court noted that:

> [T]he duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position. It does not include a requirement to reassign or transfer an employee to another position. *Id.* at 1188.

See also Gardner v. Morris, 752 F.2d at 1281; *Dexler v. Carlin*, 40 FEP Cases 633, 639 (D. Conn. 1986) ("[T]he requirement that an employer make reasonable accommodation to the known handicaps of job applicants does not mandate that an employer consider handicapped applicants for jobs for which they have not applied"); *Alderson v. Postmaster General of the United States*, 598 F. Supp. 49, 55 (W.D. Okla. 1984). Thus, the School Board did not violate any obligation under Section 504 by failing to offer Mrs. Arline positions other than the one she occupied at the time of her dismissal.[13]

In the instant case, Mrs. Arline did not apply for or otherwise express interest in other jobs at the time of her dismissal. In fact, as the district court observed, pet. app. at C-2, Mrs. Arline was not certified to teach in other than elementary education. Where an employee does not possess a basic criterion, such as a teaching certificate, required for a job, it

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[13] Of course, employers are free to offer such other positions *voluntarily* to a handicapped individual, but they are under no legal obligation to do so. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

cannot be said that the denial of such a job was "solely because of his handicap" within the meaning of Section 504. *See, e.g., Swann v. Walters*, 620 F. Supp. at 747 (plaintiff not "otherwise qualified" where he was unable to hold a security clearance); *cf. Guerriero v. Schultz*, 557 F. Supp. 511, 514 (D.D.C. 1983) (plaintiff not "otherwise qualified" where his condition prevents him from accepting a position overseas).

Accordingly, it is clear that Mrs. Arline was not "otherwise qualified" for the position of elementary school teacher because she could not perform the essential functions of that job without endangering the health and safety of others. The School Board met any duty of "reasonable accommodation" which it might have had by allowing her to take a leave of absence until her disease could be treated, and was under no legal obligation to offer her other jobs that she had not applied for and for which she did not possess the necessary teaching certification. Under these circumstances, it simply cannot be said that the School Board violated Section 504.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding that tuberculosis is a handicap within the meaning of Section 504 should be reversed. Even if tuberculosis does constitute a handicap under that statute, the lower court decision should be reversed because the respondent was not "otherwise qualified" for the position of elementary school teacher because of the direct threat to the health and safety of others which her condition presented.

Respectfully submitted,

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July 11, 1986